

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4
5 IN RE STATIC RANDOM ACCESS MEMORY
6 (SRAM) ANTITRUST LITIGATION

No. 07-md-01819 CW

7 ORDER DENYING
8 MOTION FOR LEAVE
9 TO INTERVENE AND
10 TO MODIFY
11 PROTECTIVE ORDER
12 (Docket No. 1343)

13 /
14
15 Non-parties Bryar Law Corporation, David Bratton and
16 Communications Méga-Sat Inc. (collectively, Movants or Canadian
17 plaintiffs), the plaintiffs in three Canadian putative class
18 actions, move to intervene in this action, under Federal Rule of
19 Civil Procedure 24(b)(1)(B), for the limited purpose of accessing
20 certain evidence. Docket No. 1343. In addition, the Canadian
21 plaintiffs move to modify the protective order governing the
22 sought-after evidence.

23 Defendants NEC Electronics America, Inc. (presently known as
24 Renesas Electronics America, Inc.) and NEC Electronics Corporation
25 (presently known as Renesas Electronic Corporation), on behalf of
26 themselves and certain Defendants (collectively, Defendants),¹
27 oppose the motion. Third party witness Kyocera Communications

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29 _____
30 ¹ The opposing parties are Defendants Samsung Electronics
31 Co., Ltd. and Samsung Semiconductor, Inc., Hynix Semiconductor,
32 Inc., Hynix Semiconductor America, Inc., Etron Technology, Inc.,
33 Etron Technology America, Inc., Toshiba Corporation, Toshiba
34 America Electronic Components, Inc. and Cypress Semiconductor
35 Corporation.

1 (formerly known as Kyocera Wireless Corporation) joined
2 Defendants' opposition, while the Indirect Purchaser Plaintiffs
3 submitted a statement of non-opposition to the motions. Having
4 considered all of the parties' submissions, the Court DENIES the
5 Canadian plaintiffs' motions.

6 BACKGROUND

7 The Canadian plaintiffs initiated their lawsuits in British
8 Columbia, Ontario and Quebec in 2007, seeking damages from the
9 manufacturers and producers of static random access memory (SRAM)
10 for alleged anti-competitive conduct in violation of Canadian
11 antitrust law. Declaration of Reidar Mogerman, Exhibits A, B & C.
12 They assert the same anti-competitive conspiracy alleged in the
13 present action before this Court, except that the Canadian
14 plaintiffs allege economic harm resulting from purchases of price-
15 fixed SRAM in Canada. Progress in the Canadian SRAM litigation
16 was halted until January 2010, pursuant to several pending
17 appeals, and as of the date this motion was filed the parties had
18 not begun discovery in any of the three actions. Mogerman Decl.,
19 ¶¶ 2, 5.

20 Canadian plaintiff Bryar Law brought an application before
21 the British Columbia Supreme Court on September 21, 2010, seeking
22 the production of unredacted versions of all materials filed by
23 any party in this action in relation to the motions to certify
24 classes of direct and indirect purchasers, including unredacted
25 expert reports. Mogerman Decl., Exh. E at 3-4. On November 25,
26

1 2010, the court ruled that limited precertification discovery
2 would be permitted, but the discovery request was overbroad. The
3 court found that the narrower request for unredacted expert
4 reports was within the scope of limited discovery. Nevertheless,
5 the court denied the discovery request, holding instead that the
6 request for disclosure should be brought in the court presiding
7 over the United States SRAM proceedings. The court reasoned that
8 the undersigned and the parties in the United States SRAM
9 proceedings better understood the nature of the information
10 sought, the provisions of the protective order, and the numerous
11 third party interests implicated in the disclosures sought.

13 On March 21, 2011, the Canadian plaintiffs filed the present
14 motions for permissive intervention and to modify the Court's
15 protective order so that they could access "unredacted versions of
16 the specific expert reports that have been produced by the parties
17 in this action in connection with the motions for class
18 certification." Mot. to Intervene for Limited Purpose at 5. The
19 Canadian plaintiffs do not seek to participate actively on the
20 merits of the present litigation. The parties in both the direct
21 purchaser and indirect purchaser actions here have reached
22 settlements.

24 Presently, the Court's protective order, to which the parties
25 stipulated, prohibits disclosure of discovery materials designated
26 as Confidential or Highly Confidential, except as permitted by the
27 terms of the order. Docket No. 333. The protective order

1 requires a party receiving discovery to notify the party
2 designating information "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL -
3 ATTORNEYS' EYES ONLY" after receiving service of a subpoena or an
4 order issued in other litigation that would compel disclosure of
5 such information. Furthermore, a party may not file in the public
6 record any protected material without written permission from the
7 designating party, and the party must comply with Civil Local Rule
8 79-5 in filing any protected material.
9

10 The Canadian plaintiffs do not request public disclosure of
11 the unredacted expert reports. Rather, they seek to access the
12 materials subject to the terms of the governing protective order,
13 with proposed modifications that would permit them to use the
14 materials in their actions in Canada. Counsel for the Canadian
15 plaintiffs has stated that he and his co-counsel "will seek entry
16 of comparable protective orders by the Canadian courts" and
17 suggest that the relief requested here be contingent on the entry
18 of such orders. Mogerman Decl., ¶ 8. Given their proposed course
19 of action, the Canadian plaintiffs assert that they do not
20 challenge this Court's sealing orders pertaining to the requested
21 materials.
22

DISCUSSION

I. Motion to Intervene

A. Legal Standard

27 A court may, in its discretion, permit intervention by anyone
28 who "has a claim or defense that shares with the main action a

1 common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). A
2 motion for permissive intervention under Rule 24(b) is the proper
3 method for seeking to modify a protective order, Beckman Indus.,
4 Inc. v. International Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992),
5 and such motions have been granted on behalf of collateral
6 litigants involved in lawsuits pending in non-federal
7 jurisdictions. See e.g. id. (state action); In re Linerboard
8 Antitrust Litigation, 333 F. Supp. 2d 333, 339 (E.D. Pa. 2004)
9 (Canadian litigation); In re Aftermarket Automotive Lighting
10 Prods. Antistrust Litig., 09 MDL 2007 (C.D. Cal. 2010)
11 (unpublished slip op.) (Canadian litigation).

13 In exercising its discretion, a court should "consider
14 whether the intervention will unduly delay or prejudice the
15 adjudication of the original parties' rights." Fed. R. Civ. P.
16 24(b)(3). The requirements for permissive intervention are
17 (1) the applicant must show independent grounds of subject matter
18 jurisdiction; (2) the motion must be timely; and (3) the
19 applicant's claim or defense, and the main action, must have a
20 question of law or a question of fact in common. San Jose Mercury
21 News, Inc. v. United States Dist. Court-Northern Dist. of Cal.,
22 187 F.3d 1096, 1100 (9th Cir. 1999) (citing predecessor provision,
23 Federal Rule of Civil Procedure 24(b)(2)).²

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27 ² In 2007 the language of Rule 24 was amended as part of
28 general changes to make the Civil Rules more easily understood and
to increase the consistency of terminology. The changes were
intended to be stylistic only.

1 B. Analysis

2 The parties do not dispute that the Canadian plaintiffs have
3 satisfied the first and third prongs of the test for a permissive
4 intervention. Rather, their dispute centers on the timeliness of
5 the motion.

6 The Ninth Circuit test for the timeliness of a motion to
7 intervene considers "1) the stage of the proceedings at which an
8 applicant seeks to intervene; 2) the prejudice to other parties;
9 and 3) the reason for and length of any delay." Empire Blue Cross
10 and Blue Shield v. Janet Greeson's A Place for Us, Inc., 62 F.3d
11 1217, 1219 (9th Cir. 1995).

13 First, Defendants contend that the Canadian plaintiffs'
14 motion is untimely because this case has settled. However, the
15 fact that this action is closed as a result of the parties'
16 settlements is not necessarily dispositive. District courts have
17 permitted intervention for the limited purpose of accessing
18 discovery in cases which have already settled. In re Linerboard
19 Antitrust Litigation, 333 F. Supp. at 339 (finding non-party's
20 motion to intervene timely when it was filed less than six months
21 after the settlement of the underlying action and the commencement
22 of movant's collateral litigation in Canada); see e.g., Beckman
23 Indus., 966 F.2d 470 (motion to intervene sought and granted two
24 years after settlement, although the Ninth Circuit did not analyze
25 the timeliness of the motion to intervene); Foltz v. State Farm
26 Mutual Automobile Ins. Co., 331 F.3d 1122 (9th Cir. 2003) (district
27 court denied motion to intervene in state court proceeding because
28 intervenor had waited three years to file motion to intervene).

court permitted third-parties to intervene after case settled,
1 although the propriety of the order granting permissive
2 intervention was not addressed on appeal), compare, In re Vitamins
3 Antitrust Litigation, 2001 U.S. Dist. LEXIS 25068 (D.D.C.)
4 (granting the Canadian plaintiffs' motion to intervene in ongoing
5 antitrust litigation in the United States for the purpose of
6 seeking a modification of the court's protective order).
7

Nevertheless, these cases are not controlling. The Canadian
8 plaintiffs have not pointed to any authority stating that a
9 district court may not deny permissive intervention when it is
10 filed at this late stage. This litigation began in 2007, and the
11 first of the expert reports sought through this motion was filed
12 in this action in May 2008, while the last expert report was filed
13 in August 2009. Three years later the Canadian plaintiffs moved
14 to intervene only after nearly all parties had reached
15 settlements. Although the Canadian litigation is still in its
16 early stages, the present multi-district litigation has ended.
17

The timeliness of the present motion is determined based on
20 the status of this action and whether allowing a non-party to
21 intervene is prejudicial to the parties in this action. In re
22 Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, 255
23 F.R.D. 308, 316 (D. Conn. 2009). The delay in the Canadian SRAM
24 litigation bears little weight in justifying a delayed motion to
25 intervene in this action. Intervention would burden the parties
26 and non-parties in this action by requiring them to continue
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1 policing access to confidential information disclosed in the
2 present case. See Empire Blue, 62 F.3d at 1220-21 (affirming
3 denial of a third-party's motion to intervene for the limited
4 purpose of accessing discovery when the moving party failed to
5 provide a reason for delaying its motion to intervene for years,
6 despite knowing of the existence of the litigation). Such a
7 continuing obligation is contrary to the expectation of parties
8 that have sought to end litigation by settling the claims. See
9 id. (finding that third party intervention to access discovery
10 threatened to undo a settlement agreement).

12 In sum, the Canadian plaintiffs' motion to intervene is
13 denied for lack of timeliness.

14 II. Motion to Modify protective orders

15 Even if the Court were to grant the present motion to
16 intervene, the Court finds that a modification to the existing
17 protective order is unwarranted.

18 A. Legal Standard

19 "It is well established that the fruits of pre-trial
20 discovery are, in the absence of a court order to the contrary,
21 presumptively public." San Jose Mercury News, Inc. v. United
22 States Dist. Ct., 187 F.3d 1096, 1103 (9th Cir. 1999). However,
23 "Rule 26(c) authorizes a district court to override this
24 presumption where 'good cause' is shown." Phillips ex rel.
25 Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1213 (9th
26 Cir. 2002). Under Federal Rule of Civil Procedure 26(c), a "court

1 may, for good cause, issue an order to protect a party or person
2 from annoyance, embarrassment, oppression, or undue burden or
3 expense, including . . . requiring that . . . confidential
4 research, development, or commercial information not be revealed
5 or revealed only in a specified way . . ." Fed. R. Civ. P.
6 26(c)(1)(G). The Supreme Court has interpreted Federal Rule of
7 Civil Procedure 26(c) as conferring "broad discretion on the trial
8 court to decide when a protective order is appropriate and what
9 degree of protection is required." Seattle Times Co. v.
10 Rhinehart, 467 U.S. 20, 36 (1984) ("[t]he unique character of the
11 discovery process requires that the trial court have substantial
12 latitude to fashion protective orders.").

13 B. Analysis

14 At the outset, the Canadian plaintiffs and Defendants here
15 dispute the standard applicable to the present motion. The
16 Canadian plaintiffs argue that a good cause standard applies to
17 determine whether to restrict their access to the requested
18 materials. Defendants argue that compelling reasons must exist to
19 allow access to the expert reports, which were subject to numerous
20 sealing orders.

21 Phillips, a case upon which Defendants rely, stated that
22 "when a party attaches a sealed discovery document to a
23 nondispositive motion, the usual presumption of the public's right
24 of access is rebutted, so that the party seeking disclosure must
25 present sufficiently compelling reasons why the sealed discovery

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document should be released." 307 F.3d at 1213. However, Phillips and Foltz, 331 F.3d at 1134-36, applied the compelling reasons standard where intervenors asserted a federal common law right of access to material filed with the courts. In Phillips the Los Angeles Times moved to intervene to gain access to sealed records, attached to a motion for sanctions arising from purported discovery abuse, for the purpose of releasing certain information to the general public. The Ninth Circuit, in considering the newspaper's contention, determined that the newspaper was required to provide a compelling justification for the public release of sealed discovery attached to a non-dispositive motion. Id. at 1212-13. Similarly, in Foltz, the intervenors, who were private plaintiffs involved in collateral litigation, sought certain sealed documents filed in connection with motions for summary judgment and did not make any express commitment to withhold the information from the public. 331 F.3d at 1136. The court weighed whether the collateral litigants could access the documents consistent with the public's federal common law right to judicial records, and required the demonstration of compelling reasons to justify allowing disclosure. Id. at 1134-37.

Here, however, the Canadian plaintiffs do not seek to release the redacted information to the public. Instead they intend only to use the information for purposes of litigating their actions in Canada and have agreed that their access should be contingent on their securing comparable protective orders in the Canadian

1 courts. Thus, the "compelling need" standard associated with the
2 federal common law right of access to judicial records does not
3 apply. See Beckman, 966 F.2d at 475 (rejecting the requirement
4 that the intervenor show "extraordinary circumstances" or a
5 "compelling need" to secure modification of a protective order,
6 reasoning that "Ninth Circuit precedent strongly favors disclosure
7 to meet the needs of parties in pending litigation."). The
8 modification of the Court's protective order requires only a
9 demonstration of good cause.

10

11 The expert reports and declarations the Canadian plaintiffs
12 seek, filed in connection with the motions for class
13 certification, were redacted pursuant to the Court's sealing
14 orders, not on the basis of the blanket, stipulated protective
15 order. In issuing its orders to seal, the Court made specific
16 determinations that good cause existed to seal the information.
17
18 See e.g., January 11, 2011 Order Granting Defendants'
19 Administrative Motion to Seal Documents (finding that certain
20 specified sections of Michelle Burtis' Sur-rebuttal Declaration
21 and Exhibits contained Kyocera's confidential, proprietary, and
22 competitively sensitive information and constituted "sealable"
23 material). Therefore, the burden is on the Canadian plaintiffs to
24 establish good cause to modify the protective orders to allow
25 access to the unredacted reports for the purposes of Canadian
26 actions. See Phillips, 307 F.3d at 1211 n.1 ("the burden of proof
27 will remain with the party seeking protection when the protective
28

1 order was a stipulated order and no party had made a 'good cause'
2 showing").

3 Turning to the application of the good cause standard, as
4 noted earlier, in the Ninth Circuit, disclosure to meet the needs
5 of parties in pending litigation is strongly favored. Beckman
6 Indus., 966 F.2d at 475) (citing Olympic Refining Company v.
7 Carter, 332 F.2d 260, 264-65 (9th Cir. 1964); see also Foltz, 331
8 F.3d at 1131 ("Allowing the fruits of one litigation to facilitate
9 preparation in other cases advances the interest of judicial
10 economy by avoiding the wasteful duplication of discovery.").
11 However, "a court should not grant a collateral litigant's request
12 for such a modification automatically." Id. at 1132. To
13 determine whether a modification of a protective order is
14 warranted, courts consider "the relevance of the protected
15 discovery to the collateral proceedings and its general
16 discoverability therein." Id. at 1132. In addition, the court
17 must "weigh the countervailing reliance interest of the party
18 opposing modification against the policy of avoiding duplicative
19 discovery." Id. at 1133.

20 Although the Canadian plaintiffs satisfy the low threshold
21 for demonstrating that they seek relevant information, see Foltz,
22 331 F.3d at 1133 (stating that a court considering a motion for
23 modification of its order makes only a "rough estimate of
24 relevance"), and their motion does not attempt to circumvent
25 Canadian procedures and discovery limitations, the avoidance of
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1 duplicative discovery does not outweigh the reliance interests of
2 the parties opposing modification of the protective order. The
3 amount of duplicative discovery avoided will not be substantial
4 because the sought-after unredacted expert reports focus upon and
5 limit analysis to the United States market for SRAM and the impact
6 of the alleged conspiracy on American businesses and consumers.
7

8 Furthermore, the reliance interests of Defendants and third-
9 party witness Kyocera are significant. They relied upon the
10 protective order in releasing sensitive, confidential information,
11 and the order made clear that a party seeking to file certain
12 confidential information with the Court would have to move for a
13 sealing order. Defendants and Kyocera may not rely on the blanket
14 protective order alone as a guarantee that discovery information
15 they produced would remain confidential. See id.; Beckman, 966
16 F.2d at 476. However, they reasonably expected that discovery
17 information that the Court ultimately ordered filed under seal,
18 such as the expert reports and declarations in this case, would be
19 barred from public access and not subject to use in other
20 litigation outside of the United States. The need to police
21 dissemination of their confidential information in three different
22 Canadian cases as well as in this Court would prejudice Defendants
23 and third-parties. "Among the goals furthered by protective
24 orders is reducing conflict over discovery and facilitating the
25 flow of information through discovery. . . [C]hanging the ground
26 rules later is to be avoided because protective orders that cannot
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1 be relied upon will not foster cooperation through discovery."

2 Id. at 1137 (quoting Wright, Miller & Marcus, § 2044.1).

3 The Canadian plaintiffs have not established good cause to
4 modify the protective order to grant them access to the unredacted
5 expert reports and declarations.

6 CONCLUSION

7 The Canadian plaintiffs' motions to intervene and to modify
8 the protective order are DENIED. Docket No. 1343.

9
10 IT IS SO ORDERED.

11
12 Dated: 11/1/2011


13 CLAUDIA WILKEN
14 United States District Judge